STATE OF MICHIGAN

COURT OF APPEALS

WAYNE LOCKARD,

Plaintiff-Appellant,

v

VALKEN INDUSTRIES, LLC,

Defendant-Appellee

and

DICK CUMMINGS d/b/a C&C RENTAL,

Defendant.

.

UNPUBLISHED
February 24, 2011

No. 295135
Oakland Circuit Court
LC No. 07-087293-NO

Before: SAAD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

In this construction injury case, plaintiff, Wayne Lockard, appeals as of right the trial court's grant of summary disposition in favor of defendant, Valken Industries.[1] Because plaintiff's claim is barred by the simple tool doctrine, the common work area doctrine did not apply, defendant did not retain such control of the work area as to hold defendant responsible for plaintiff's injuries, and, the doctrine of res ipsa loquitur does not apply, the trial court properly granted defendant's motion for summary disposition, and, we affirm.

I. Facts

This case stems from an accident that occurred when plaintiff fell from scaffolding and suffered injuries on November 17, 2005. Plaintiff is a self-employed handyman who was performing services as an independent contractor for defendant at 212 West Sheffield, in Pontiac, Michigan. In his complaint, plaintiff claims that while working on ceiling lights at

[1] Dick Cummings d/b/a C&C Rental was dismissed, with prejudice, from this case by stipulation on May 20, 2009. (Order for Dismissal, May 20, 2009.)

defendant's building, the scaffolding he was using collapsed resulting in the work platform he was standing on to drop, causing plaintiff to fall eight feet to the floor and suffer severe injuries.

Kenneth Siegfried owns defendant Valken Industries, LLC, which owns the building where the incident occurred at 212 West Sheffield, in Pontiac. Siegfried wanted to fix the former machine shop up so he could move a classic car restoration business into the building. Siegfried and plaintiff met through a mutual friend at a car show in 2005. By coincidence, plaintiff lived near the building on West Sheffield. About five weeks before the accident, Siegfried hired plaintiff on an hourly basis to perform work at the building including general cleaning, installing lighting, electrical repair, and drywall work. Their agreement was for plaintiff to work for Siegfried as an independent contractor at an hourly rate for three to six hours per day for four days a week. Siegfried also had another handyman helping with the building improvements, Randy Dye. Though, as a classic car enthusiast, Dye did not receive wages from Siegfried. Dye and Siegfried were neighbors and Siegfried would work on Dye's classic car in return for Dye's help in the restoration of the building. Plaintiff did not have keys to the building and relied on Dye for access to the building.

Before starting to work, plaintiff informed Siegfried that he would need scaffolding to perform the work and told him that he could rent scaffolding at C&C Rent-All. A month before the accident, on October 17, 2005, Siegfried rented a 12 foot roller scaffold from C&C Rent-All. C&C Rent-All did give Siegfried verbal instructions on the scaffolding while they were loading it into his truck, but no written instructions. Siegfried and Dye assembled the scaffolding after Siegfried brought it back to the shop. Siegfried stated that although he had never assembled scaffolding before, there was nothing he did not comprehend when assembling the scaffolding. He also stated that while he did not specifically remember reading any of the labels or instructions on the scaffolding itself, he stated that as he was putting it together, if there was a warning label, he would have read it, and understood it. Siegfried stated that erecting the scaffolding involved only putting spring-loaded pins into holes. Plaintiff testified that before he climbed on to the scaffolding the first time he took a quick look to see how it was assembled and understood that there were pins on the side arms that fit into holes on the H frames of the scaffolding. But plaintiff never, at any time, checked to see if the pins were securely seated into their holes because he assumed that Siegfried and Dye assembled it correctly.

Siegfried, Dye, and plaintiff all used the scaffolding at different times. But after constructing the scaffolding, Siegfried never altered the scaffold in any way. Siegfried stated that plaintiff and Dye changed the level of the scaffolding within a week after Siegfried and Dye constructed it. According to plaintiff, as initially assembled, the top of the scaffolding hit an I-beam that extended across the building. Plaintiff stated that because the scaffold came in sections, and because there was an extra half piece on the top hitting the I-beam, plaintiff and Dye removed the extra piece to allow it to easily pass under the support beam. Plaintiff testified at deposition that he also dropped down the height of the work platform to accommodate the work he needed to do. He also testified that he did not ever adjust the height of the work platform. Then, plaintiff testified that that he did not specifically remember changing the height of the work platform. Siegfried and Dye both testified that plaintiff did change the height of the work platform.

Plaintiff testified that when he started to use the scaffolding he determined that he needed to take off a section of the H frame to allow the scaffolding to move freely. Just by looking at the scaffolding, without any directions, plaintiff was able to pull out the necessary pins, take off the arm braces, lift out the top section of the H frame, and then put the arm braces back by placing the pins in the holes. Plaintiff testified that the function or operation of the scaffolding was so obvious when he looked at it that he did not need written instructions and did not need to read the labels on the scaffolding and for that reason, did not in fact read the labels.

Both Siegfried and plaintiff testified that from the day Siegfried rented the scaffolding, October 17, 2005, to the day of the accident, November 17, 2005, there had been no problems at all with the scaffolding. Plaintiff had not worked at the building for several days before the date of the accident, possibly a week. Plaintiff testified that he arrived at the building on the day of the accident sometime around 1:00 pm. He stated that the work platform on the scaffolding was at the same level it was at when he had last used the scaffolding the previous week. Plaintiff testified that he believed Dye had used the scaffolding since plaintiff last worked because there was work completed that plaintiff had not performed and that Dye would have needed the scaffolding to complete.

Plaintiff testified that his tools were where he left them on the scaffolding and the condition of the scaffolding looked just as it did the last time he used it. In order to begin work, plaintiff moved the scaffolding to where he needed it to be to work on a light fixture. He climbed up the scaffolding and worked on the light for about five minutes. Plaintiff had no problems with the scaffolding and nothing seemed to be loose. Though, plaintiff had not checked the pins before climbing on the first time. Plaintiff then climbed down and Dye helped him move the scaffolding to the next light fixture. Plaintiff climbed back up the scaffolding in the same manner he did the first time that day. Once again, plaintiff did not check the pins before climbing on a second time. Plaintiff stepped on the platform and commenced work on the second light. Plaintiff worked on the light for about five minutes before the work platform collapsed. He stated that he had just finished work on the second light when he heard items hitting the ground and then the platform fell out from under him and he fell to the ground. Siegfried and Dye had been standing near the scaffolding and plaintiff looked at them as the platform collapsed. Siegfried called 911 and paramedics came to take plaintiff to the hospital.

Siegfried testified that after the accident he inspected the scaffolding and found that a spring-loaded pin had come out of its hole for an unknown reason. Siegfried did not know how the pin came out of the hole.

Plaintiff filed his complaint against defendant on November 13, 2007 alleging that it was defendant's duty to provide safe scaffolding to plaintiff and to properly inspect the equipment and warn plaintiff of any dangerous conditions of which defendant reasonably should have known. Plaintiff also alleged that it was defendant's duty to assure that the scaffolding was properly assembled before allowing plaintiff to use the scaffolding. Plaintiff alleged that because defendant failed to properly assemble or inspect the scaffolding before supplying it to plaintiff for use, defendant's negligence and gross negligence caused plaintiff's fall and resulted in severe injuries to plaintiff.

Defendant answered plaintiff's complaint on April 10, 2008 denying plaintiff's allegations and asserting that plaintiff's claims were: barred by the statute of limitations; barred by plaintiff's comparative negligence which was the proximate cause of his injuries; caused by the negligence of other parties or non-parties to the matter over whom defendant had no control; and, were barred as a result of plaintiff's failure to mitigate his damages.

Defendant filed a motion for summary disposition on April 21, 2009. Defendant argued that: plaintiff could not make out a prima facie case of negligence; there was no genuine issue of material fact; defendant owed no duty to oversee the work of plaintiff independent contractor; the simple tool doctrine barred plaintiff's recovery; there was no duty to warn someone of a risk of which that person is aware; and, because plaintiff testified that he was so familiar with the functioning of the scaffolding apparatus that reading the warning labels was completely unnecessary, there is no legal or factual support for plaintiff's claim.

The trial court heard argument on the motion on September 2, 2009. The trial court granted defendant's motion finding that plaintiff's claim was barred by the simple tool doctrine; that the "common work area doctrine" did not apply; that there was no evidence that defendant retained such control so as to hold defendant responsible for plaintiff's injuries; and that the res ipsa loquitur doctrine did not apply in that there was no evidence that the pin coming out of the end frame was caused by an agency or instrumentality within defendant's exclusive control, stating specifically:

> The matter is before the Court upon the Defendant's Motion for Summary Disposition, brought pursuant to MCR 2.116(C)(10).
>
> The Court finds that the Plaintiff's claim is barred by the [S]imple Tool Doctrine, which holds that a master's under no obligation to his servants, and this Doctrine has been extended to independent contractors to inspect their use of common tools and appliances, citing Krespin (phon) versus Wright, 105 Mich 194, and Shelfrin (phon) versus Michigan Central Railroad, 245 Mich 56.
>
> Plaintiff has testified that the use and operation of the scaffolding was perfectly clear to him. The scaffold contained warnings as discussed above. Because the Defendant owed no duty to warn the employee of obvious defects of which the employee should be aware, Plaintiff's claims must fail as to this claim.
>
> The Court further finds that the Common Work Area Doctrine wouldn't apply. Two contractors using the scaffold work area together and Siegfried does not constitute a significant number of workers sufficient for the Doctrine to apply. There's also no evidence that Siegfried retained such control so as to hold Defendant responsible for Plaintiff's injuries.
>
> Lastly, the Court finds that the Res Ipsa Loquitur Doctrine wouldn't apply under the Doctrine of Res Ipsa Loquitur, and the inference of negligence can arise from the Plaintiff's injury: one, ordinarily would not have occurred in the absence of negligence; two, was caused by an agency or Instrumentality within the exclusive control of the Defendant; and, three, was not due to any voluntary

> action or contribution of Plaintiff, citing Cloverleaf Car Company versus Phillips Petroleum, 213 Mich App 186.
>
> Here, there is no evidence that the pin coming out was caused by an agency or instrumentality within Defendant's exclusive control, and was not due to any voluntary action or contribution of the Plaintiff.
>
> Therefore, I'm granting Defendant's Motion.

The trial court memorialized its verbal opinion in an order dated September 10, 2009. Plaintiff now appeals as of right.

II. Standard of Review

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Moreover, the Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham County Rd Comm'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Summary disposition "is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Latham*, 480 Mich at 111. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. Simple Tool Doctrine

Plaintiff first argues that the trial court erred when it ruled as a matter of law that plaintiff's claim is barred by the simple tool doctrine because defendant owed no duty to warn plaintiff of obvious defects in the scaffolding of which plaintiff should have been aware. Defendant responds that plaintiff's claim is barred by the simple tool doctrine where plaintiff testified that the workings of the scaffolding were so obvious to him that he did not need any instructions to assemble it.

> The simple-tool doctrine is an exception to the employer's duty to furnish his servant with reasonably safe machinery to perform the required work. *Sheltrown v Michigan Central R Co*, 245 Mich 58; 222 NW 163 (1928). The Court in *Sheltrown* held that a master is "under no obligation to his servants to inspect during their use those common tools and appliances with which everyone is familiar . . . ." *Id*., 63. The master's nonliability under the simple-tool exception rests upon the assumption that the employee is in the same, if not superior, position to observe the defect as the employer. *Id*., 64. [*Cressman v Wright*, 105 Mich App 194, 198; 306 NW2d 447 (1981).]

The simple tool doctrine is premised on the fact that the employee's familiarity with the common tool requires no instruction from the employer particularly where the employee would readily recognize any defect. See *Cressman*, 105 Mich App at 198-199.

In *Pawlowski v Van Pamel*, 368 Mich 513; 118 NW2d 395 (1962), and *Rule v Giuglio*, 304 Mich 73; 7 NW2d 227 (1942), both employees were familiar with a ladder at issue because it was utilized before the injury occurred. Similarly, in this case, assuming arguendo that for purposes of the application of the rule, defendant is comparable to an employer and plaintiff, an employee, plaintiff was clearly familiar with scaffolding because he had used it before, he told Siegfried that it was required for him to be able to perform certain jobs because of the height of the ceiling in the building, and referred Siegfried to a business where he could rent scaffolding. There is also support for the trial court's ruling that plaintiff was exceedingly familiar with the specific scaffolding at issue because plaintiff used it without incident for a month and reconfigured it himself to suit the needs of the job without any instruction whatsoever.

Plaintiff admitted that he required no written instructions to understand the use and assembly of the scaffolding because it was readily apparent to him upon viewing it. There is absolutely no evidence in the record that defendant had superior knowledge to plaintiff with regard to the assembly or use of the scaffolding or had any knowledge of the pin being in the unlocked position and causing the fall. See 27 Am Jur 2d, Employment Relationship, § 231, p 720; *Philip Carey Roofing & Mfg Co v Black*, 129 Tenn 30; 164 SW 1183, 1184-1185 (1914). ("The foundation of the simple tool doctrine is the assumption that the knowledge of the master and servant must be equal. Such a presumption cannot be indulged where the master has actual notice of a defect, where the proof shows his knowledge is superior.") Under these circumstances, while Siegfried did initially assemble the scaffolding and used it from time to time, the great majority of the evidence supports the notion that plaintiff was clearly in a superior position to observe the condition that caused the scaffolding to collapse as well as his resultant injuries when he used it multiple times on a daily basis, adjusted its configuration, could have easily inspected it before climbing on it, but did not. Plaintiff has not shown error.

IV. Common Work Area Doctrine

Next, plaintiff argues that the trial court erred when it ruled as a matter of law that the common work area doctrine did not apply because there were only two contractors and Siegfried using the scaffold work area and such does not constitute a significant number of workers sufficient for the doctrine to apply. To establish a claim under the common work area doctrine, a plaintiff must prove the following: "(1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 57; 684 NW2d 320 (2004).

There is no evidence in the record that anyone other than plaintiff and Dye performed work at the Sheffield building. In point of fact, Siegfried actually only hired one independent contractor, plaintiff, to do work at the premises because Siegfried never hired Dye, never paid him a wage, and Dye did not think of himself as a contractor, but rather a "neighbor" helping out. Plaintiff simply cannot establish a claim under the common work area doctrine where there

was no evidence that the risks involved in using the scaffolding to install overhead light fixtures and other tasks created a high degree of risk to a significant number of other workers in a common work area. *Id*.; *Alderman v JC Development Communities, LLC*, 486 Mich 906; 780 NW2d 840 (2010). Even if we were to consider the scaffolding with the loose pin a hazard, there is no evidence that a significant number of workmen had been, or would be, exposed to the hazard. Plaintiff has not shown error and the trial court properly granted defendant's motion for summary disposition on plaintiff's common work area claim.

V. Retained Control of Work Area

Plaintiff also contends that the trial court erred when it ruled as a matter of law that defendant did not retain such control of the work area as to hold defendant responsible for plaintiff's injuries. "[T]he 'retained control doctrine' is . . . subordinate to the 'common work area doctrine' and is not itself an exception to the general rule of nonliability." *Ormsby*, 471 Mich at 49. Instead, when the common work area doctrine applies, "and the property owner has sufficiently 'retained control' over the construction project, that owner steps into the shoes of the general contractor and is held to the same degree of care as the general contractor." *Id*. Since we have already determined that plaintiff cannot prevail against defendant on a common work area theory of liability there is no need to determine whether defendant retained sufficient control for the doctrine to apply to it. However, we do point out that plaintiff specifically testified that he did not receive direction on what project to do at any time from Siegfried or anyone else. Plaintiff seemed to show up based on his own schedule and there was no evidence that Siegfried was there some, most, or all of the time. Dye let plaintiff in the building. Plaintiff testified that he performed tasks that he saw that needed to be done to accomplish the goal of renovating the shop. Defendant has not shown error.

VI. Doctrine of Res Ipsa Loquitur

Plaintiff's final argument, res ipsa loquitur, does not save his case. Plaintiff argues that the trial court erred when it ruled as a matter of law that the doctrine of res ipsa loquitur does not apply because there was no evidence the pin was caused to come out of the scaffolding by any agency or instrumentality within defendant's exclusive control. Proof of negligent conduct can be established by a permissible inference of negligence from circumstantial evidence. To invoke the doctrine of res ipsa loquitur, a plaintiff must show: (1) that the event was of a kind that ordinarily does not occur in the absence of negligence; (2) that it was caused by an agency or instrumentality within the exclusive control of the defendant; (3) that it was not due to any voluntary action of the plaintiff; and (4) that evidence of the true explanation of the event was more readily accessible to the defendant than to the plaintiff. *Woodard v Custer*, 473 Mich 1, 7; 702 NW2d 522 (2005).

While we could possibly accept plaintiff's assertion that this event was of a kind that ordinarily does not occur in the absence of negligence, plaintiff must also produce some evidence of wrongdoing beyond the mere happening of the event. *Fuller v Wurzburg Dry Goods Co*., 192 Mich 447, 448; 158 NW 1026 (1916). Plaintiff failed to do so. Plaintiff has provided no evidence that the accident was caused by an agency or instrumentality within the exclusive control of defendant. There seems to be no dispute that the collapse of the scaffolding was caused by a spring-loaded pin that inexplicably came loose from the corresponding hole in which

it should have been securely inserted. While there was evidence on the record that others used the scaffolding occasionally including both Siegfried and Dye, plaintiff used the scaffolding most often. Although there is some confusion in the record regarding whether plaintiff ever lowered the work platform, it is undisputed that after Siegfried and Dye assembled the unit, plaintiff disassembled part of the unit and put it back together to suit his needs. And, importantly, on the day of the accident, only plaintiff was using the scaffolding. Plaintiff testified that when he looked at the scaffolding it looked the same as it had previously and he climbed on it and worked on the first light fixture without incident. He then moved the scaffolding with Dye and once again climbed onto the scaffolding, but at some point after he stepped down on the work platform, it collapsed. Siegfried was present but there was no evidence he used the scaffolding that day or even touched it. On this record, plaintiff cannot show that the scaffolding that caused plaintiff's injuries was in the exclusive control of defendant. *Woodard*, 473 Mich at 7.

With regard to the last two elements of the test, it does not appear from the record that this accident was due to any voluntary action of the plaintiff. There was no evidence that plaintiff had any idea that a pin was loose or that the scaffolding was not stable. But, at the same time, the record does not show that evidence of the true explanation of the event was more readily accessible to defendant than to plaintiff. Again, Siegfried was present on the date of the accident, but there was no evidence that he had any interaction with the scaffolding. To the contrary, plaintiff climbed up the scaffolding to work on the first light fixture, then climbed down, then moved the scaffolding to the next location with assistance from Dye. Plaintiff then once again climbed up the scaffolding before suffering his fall. Plaintiff had to grip pieces of scaffolding on the way up and was at eye level with the instrumentalities constituting the scaffolding. Plaintiff had ample opportunity to inspect the scaffolding, but testified that he did not. Plainly, on these facts, the true explanation of the event was more readily accessible to plaintiff than to defendant. *Woodard*, 473 Mich at 7. Plaintiff cannot invoke the doctrine of res ipsa loquitur on these facts, and therefore the trial court properly granted summary disposition in favor of defendant on this issue. *Id.*

VII. Conclusion

Because plaintiff's claim is barred by the simple tool doctrine, the common work area doctrine did not apply, defendant did not retain such control of the work area as to hold defendant responsible for plaintiff's injuries, and, the doctrine of res ipsa loquitur does not apply, the trial court properly granted defendant's motion for summary disposition.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio